No. 16108

United States Court of Appeals

FOR THE NINTH CIRCUIT

CORNELI SEED COMPANY, a corporation,
Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellee.

Brief of Appellee

Appeal from the United States District Court
for the District of Idaho,
Southern Division.

BRYAN P. LEVERICH
10 South Main Street,
Salt Lake City, Utah
L. H. ANDERSON
E. C. PHOENIX
D. A. BYBEE
P. O. Box 530,
Pocatello, Idaho
Attorneys for Appellee.

GATEWAY PRINTERS—POCATELLO

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JURISDICTION

The appellee agrees with appellant's jurisdictional statement.

STATEMENT OF FACTS

The appellant, Corneli Seed Company, has appealed to this court from a Judgment entered in favor of the appellee and against the appellant, dated April 14, 1958. (R. 48-49) The Judgment was entered upon an agreed statement of fact (R. 14-42).

This action was instituted by the appellee on January 19, 1955, to recover from the appellant, the sum of $3,315.76, which the appellee had paid to the appellant upon claims presented by the appellant on nine carloads of beans, peas or shelled corn shipped from Twin Falls, Idaho, during February and March, 1953, to various points outside the State of Idaho; these shipments are detailed in Paragraph V of the agreed statement (R. 17-18) and the amounts paid to the appellant are set forth in paragraph VI (R. 18-19). Also, an additional amount sued for was $127.74, which appellant admits is due the appellee. (Paragraph VII, R. 19-20). The total amount of the suit is $3,443.50 plus interest from July 2, 1953.

After appellant's claims had been paid, the appellee concluded that appellant had not complied with the applicable tariff provision and that instead of recognizing and paying appellant's claims, it should have declined them. Accordingly, it demanded of appellant that it repay [redacted] to appellee the amounts paid, which demand was refused, and upon advice that suit would be instituted to enforce collection, the appellant advised appellee that proceedings were to be instituted before the Interstate Commerce Commission to determine the applicability, reasonableness and lawfulness of the charges upon which the within action was based (Paragraph X, R. 20).

Thereafter, and on October 1, 1954, the appellant filed a complaint with the Interstate Commerce Commission challenging the application of the rates and charges upon the nine

shipments involved herein, as well as five shipments not connected with the case at Bar. Appellant alleged that the rates were "inapplicable, unjust and unreasonable," and requested the said Commission to determine "the applicable and lawful rates, and award reparation" (Paragraph XI, R. 21-22).

Then, on the 19th day of January, 1955, as heretofore stated, this action was instituted, and inasmuch as the charges set forth in appellee's complaint were being investigated by the Interstate Commerce Commission, the parties stipulated that the appellant could have twenty days from and after the decision of the Interstate Commerce Commission in which to plead to appellee's complaint, and upon this Stipulation, the trial court, on January 28, 1955, made and entered an Order in conformity with the Stipulation (Paragraph XII, R. 8-9, 22).

Upon evidence presented by the parties to the Interstate Commerce Commission, the Commission made its Report and Order on March 27, 1956, wherein the Commission found that the tariff provisions relating to transit privileges involved herein must be observed before the appellant was entitled thereto; that the appellant did not observe them, and that the "assailed rates and charges are not shown to have been or to be inapplicable, unjust or unreasonable" and, accordingly, the cause before the Commission was dismissed; a copy of the Report and Order of the Commission is attached to the agreed statement of facts, marked Exhibit "A" and made a part thereof (Paragraph XIII, R. 22-23, R. 24-42).

The appellant herein, Corneli Seed Company, petitioned the Interstate Commerce Commission for reconsideration or further hearing in that matter, and that petition was denied on August 30, 1956, and no further proceedings were taken or had by the Seed Company in that matter (Paragraph XIV, R. 23).

As already indicated, the claims of the appellant paid by the appellee, which the appellee concluded were erroneously paid and therefore resulted in this law suit involved the question of whether or not the appellant was entitled to transit privileges on the nine shipments referred to in Paragraph V, (R. 17). In other words, if the appellant Seed Company was not entitled to transit privileges, then the charges sued upon must be repaid to the appellee.

Whether the appellant was entitled to transit privileges was the question presented to the Interstate Commerce Commission, and which question has been decided by the Interstate Commerce Commission against the appellant Seed Company, because the tariff provisions relating to transit privileges were found not to be unjust or unreasonable, and that the provisions of the tariff had not been complied with by the appellant (Paragraph XIII, R. 22-23).

If transit privileges were permitted, then the appellant was entitled to the through single-factor rate from point of origin to the final destination of the shipments; that is, from the point where the commodity was originally shipped into Twin Falls, to the final destination when billed out of

Twin Falls, whereas if the transit rate was not applicable, then the appellant was required to pay the combination rate, to-wit: the rate from the original point of origin into Twin Falls, and another rate from Twin Falls to the final destination. The latter is appellee's theory, which has been sustained by the Interstate Commerce Commission, and also by the Courts as we will herein establish.

Under paragraph III of the agreed statement (R. 15), it is shown that the transit tariff provided that when shipments are made from a transit station, such as Twin Falls, the unexpired inbound freight bills which have been recorded, or the tonnage credit slips *must* be surrendered and cancelled, and in addition to that, the outbound bills of lading or shipping orders *must* have inserted thereon the weight, point of origin and date of each inbound shipment covering the commodity forwarded, and "that the transit rate would not apply if shippers fail or decline to comply with such rules and regulations."

Appellant's only asserted defense is that stated in paragraph IV of the agreed statement (R. 16-17), which is to the effect that as early as January 5, 1944, it complied with the provisions of the transit tariff referred to in paragraph III of the agreed statement (R. 15), and thereby obtained the benefit of the transit, or through rate, but discovered sometime later that by complying with the tariff, appellant's customers were enabled to ascertain and locate appellant's producers and source of supply and proceeded to make purchases direct; that in order to effect a discontinuance of this

practice, the appellant sometime in January or February, 1949, adopted a practice of making shipments out of Twin Falls, Idaho, by using the regular form of bill of lading rather than one applicable to transit shipments, which did not show the information required by the tariff and as is mentioned in paragraph III of the agreed statement of facts, which was a prerequisite to obtaining transit privileges, following which the appellant filed with the appellee its overcharge claims, and endeavored to provide some information in support of its claims, which should have been shown on the outbound bills of lading; that some of these claims were paid by the appellee until about December 15, 1953, when appellee concluded that appellant had not complied with the applicable tariff provisions, and that the claims should not have been paid (Paragraph X, R. 21). In other words, whatever practice had been followed had to be terminated because appellant had not complied with the tariff in making the shipments, and the practice appellant adopted was not provided for in the tariff.

The appellant knew about the tariff provisions, but thereafter for the reasons stated, purposely evaded them. In any event, the tariff having the effect of law, appellant was bound by its provisions, which appellee could not waive.

QUESTIONS PRESENTED

The questions presented on this appeal, in our opinion, are these:

(1) Is the Report and Order of the Interstate Commerce Commission binding on the appellant and the court, or if not

(2) Can the appellee carrier waive the plain terms or provisions of the applicable tariff, or condone a practice not authorized by the tariff?

We think our argument will demonstrate very clearly that the answer to the first question is "yes," and the answer to the second question is "no."

ARGUMENT

I

The Report and Order of the Interstate Commerce Commission is conclusive.

As a detail of the facts show, the appellant, upon advice that suit would be instituted to recover these charges, advised appellee that proceedings were to be instituted before the Interstate Commerce Commission to determine the applicability, reasonableness and lawfulness of the charges upon which the action was based, and in the complaint filed with the Interstate Commerce Commission by appellant, it was alleged that the rates were "inapplicable, unjust and unreasonable," and requested the said Commission to determine "the applicable and lawful rates, and award reparation" (Paragraph XI, R. 21-22).

The Seed Company had only one purpose in mind in proceeding before the Interstate Commerce Commission as it did,

and that was to obtain, if it could, a ruling from the Commission favorable to its contention that it was entitled to reparation and, accordingly, to use that ruling as a defense in this action. It was not successful in its attempt, for the Commission found that the "assailed rates and charges are not shown to have been or to be inapplicable, unjust or unreasonable", hence, there could be no award of reparation, and the case before the Commission was dismissed.

The proceedings before the Interstate Commerce Commission were proper. Such proceeding is authorized by law, *49 U. S. C. A. 9*. That section provides that such complaint might be brought by a person claiming to have been damaged by a common carrier either before the Commission, or before any District Court of the United States of competent jurisdiction, "but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." The statute refers to any damages a person might sustain, but in the case at Bar, it was the only procedure by which the appellant Seed Company could obtain a decision with reference to whether the rates were inapplicable, unjust and unreasonable, and whether or not it was entitled to an award of reparation. If such a defense had been set up in the District Court, it would have been required to stay proceedings until the Interstate Commerce Commission had determined the matter. In this case the parties stipulated for a stay of the court proceedings to enable the Commission to determine the question presented to it by appellant.

After the Commission had finally ruled, the appellant made no effort to have the ruling reviewed by a court as it might have done under Title *28 U. S. C. A. Section 1336*. It has therefore accepted the decision of the Commission as to the five other overcharge claims (R. 29). Its effort now to have the District Court and this Court consider the matter is not a review of the proceedings of the Interstate Commerce Commission, but is a collateral attack upon the Findings and Order of the Commission, which cannot be done. If this might be termed a review, which it isn't, the evidence has not been brought to the court, and in the absence of that, we think it must be presumed the Order of the Interstate Commerce Commission is supported by substantial evidence.

Under Section *49 U. S. C. A. 9*, a shipper cannot file a proceeding in the District Court where his claim for damages necessarily involve a question of reasonableness calling for exercise of the Commission's primary jurisdiction. *United States vs. Interstate Commerce Commission*, 337 U. S. 426, 93 L. Ed 1451.

The construction and application of a tariff, the reasonableness of rates and a request for reparation award are in the exclusive primary jurisdiction of the Interstate Commerce Commission.

United States vs. Western P. R. Co., 352 U. S. 59, 1 L. Ed. (2d) 126;

Northwest Auto Parts Co. vs. Chicago, B. & W. R.

Co., (8 Cir.) 240 Fed. (2d) 743; Cert. denied Oct. 14, 1957, 2 L. Ed. (2d) 32;

United States vs. Chesapeake & Ohio R. Co. (4 Cir.) 242 Fed. (2d) 732;

Armour & Co. vs. Alton RR. Co. 312 U. S. 195 85 L. Ed. 771;

Terminal Warehouse Co. vs. Pennsylvania RR. Co. 297 U. S. 500, 80 L. Ed. 827;

Johnston Seed Co. vs. United States (10 Cir.) 191 Fed. (2d) 228;

United States vs. Kansas City Southern Railway Co. (8 Cir.) 217 Fed. (2d) 763;

Callanan Road Improvement Co. vs. United States, 345 U. S. 507, 97 L. Ed. 1206;

Elbow Lake Coop. Grain Co. vs. Commodity Credit Corp. 144 Fed. Supp. 54.

The Supreme Court in *United States vs. Western P. R. Co.* supra, settled this question. The court stated, "The courts must not only refrain from making tariffs, but under certain circumstances, must decline to construe them as well," and it held, "that both the issues of tariff construction and the reasonableness of the tariff as applied, were initially matters for the Commission's determination." The ruling of the court

is, of course, based upon the fact that such matters are particularly "within the special competence of an administrative body."

> See *Interstate Commerce Com'n. vs. Martin Brothers Box Co.* (9 Cir.) 219 F. (2d) 811, 813;
>
> *Shippers' Car Supply Com. vs. Interstate Commerce Com'n.* (D. C. Or.) 160 F. Sup. 939, 943

In *Terminal Warehouse Co. vs. Pennsylvania RR Co.* supra, the court noted that the warehouse company had asked for reparation as well as for a restraining order at the hands of the Commission, and it said:

> "The Commission found, however, that no damages had been proved, and its ruling as to that was final, not subject to review by this court or any other."

The court further stated that under *49 U. S. C. A. 9*, the warehouse company had a choice between the remedy at the hands of the Commission and a remedy by suit, but that according to the statute, it could not have both. It said, "Reparation under the Commerce Act was thus permanently barred by the ruling of the Commission as against the offending carrier."

In *Johnston Seed Co. vs. United States*, supra, the finding of the Commission was that the rates charged, "were not

shown to be unreasonable," and the court stated that this "amounted to an affirmative finding that such rates were reasonable." Following which, the court said (p. 231):

> "Expediency or wisdom of the order are not elements for consideration. The field for exertion of the judicial function is exhausted when it appears that there was rational basis for the intelligent finding or conclusion of the Commission."

In *United States vs. Kansas City Southern Railway Co.* supra, the court discusses *49 U. S. C. A. 9* and states that it is recognized the Commission has jurisdiction or power to resolve an administrative question relating to any possible violations by the carrier of the Act, wholly apart from its authority to grant reparation. In other words, in the case at Bar, the Seed Company was in effect contending also that the carrier was violating the terms of the tariff, by not according it transit privileges. The Commission overruled the Seed Company's contention in that respect, for it held that the appellant had not complied with the provisions of the transit tariff and, accordingly, could not be accorded the through rate (R. 34, 36, 38). Getting back to the last case just mentioned, the court said:

> "'If he asks administratively for an award of reparations, he has, of course, made an election of recovery remedies, which leaves him thereafter without the 'right to pursue' the remedy of judicial action as such" (p. 771).

In *Callanan Road Improvement Co. vs. United States,* supra, the court said:

> "Furthermore, the appellant, having invoked the power of the Commission to approve the transfer of the amended certificate to it, is now estopped to deny the Commission's power to issue the certificate in its present form and as it existed prior to the time the appellant sought its transfer."

Also, in *United States vs. Interstate Commerce Commission,* supra, the court said:

> "It may therefore be assumed that after a shipper has elected to initiate a Commission proceeding for damages, he could not later initiate an original district court action for the same damages."

And in *Elbow Lake Coop. Grain Co. vs. Commodity Credit Corp.,* supra, the court said:

> "Where ,as here, the action of an agency is of a quasi judicial character, it is well established that the validity of its order cannot be attacked by collateral proceedings."

In this case, the appellant is asking the court to consider the same asserted defense that was presented to the Commission. Therefore, it is asking in effect, for a trial de novo. This it may not do. Its only recourse would be

to seek a judicial review of the Commission's action, which it did not do. See *Reliance Steel Products Co. vs. United States,* 150 Fed. Supp. 118, 122.

In a case where the situation was reversed, a reviewing court sustained an award of the Commission, and held that it was beyond the court's province to consider the weight of the evidence or the circumstances of the reasoning by which the Commission reached its conclusions. The court said:

> "Nor can this Court say as to the Commission's conclusion 'that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute'."

New Process Gear Corp. vs. New York Central R. Co., (2 Cir.) 250 Fed. (2d) 569, 572.

Appellant discusses this proposition under Point III in its brief commencing on Page 23. However, the cases cited are, in our opinion, not in point. The case of *Sonken-Galamba Corporation vs. Union Pacific R. Co.* (10 Cir. 1944), 145 F. (2d) 808, is not a case where the shipper was making any contention about the reasonableness of the rates and was not seeking reparation. The question in the case was which one of two rates contained in the tariff applied. The jurisdiction of the Commission under the exclusive primary jurisdiction rule was not involved. The court did construe many Commission decisions in order to

determine the proper classification of the commodity in order to arrive at the applicable rate. The court did, however, state, "Of course, we do not establish the tariff rate, nor do we judge its reasonableness, rather it is our limited province to apply the prescribed reasonable rate to the factual situation before us, and in so doing we are often required to legally interpret the definitions given us by the rate making and regulating authority."

The case of *Brown and Sons Lumber Company vs. Louisville & N. R.*, 299 U. S. 393, 81 L. Ed. 301, was one where "The simple question for decision, as to each shipment, is whether there existed 'published through rates' 'in effect from point of origin to destination.' The determination of that question requires, ordinarily merely the examination of the tariff."

That case was not one where the Commission had exclusive primary jurisdiction, for as the court said, "Here, the shippers might have brought their action at law without resort to the Commission," but the court stated that the court of appeals is bound by the decision of the Commission on questions of fact, "or questions involving exercise of administrative discretion."

In the case at Bar, the Commission not only had to rule upon the application of the tariff and its reasonableness, but also had to determine whether the practice adopted by the Seed Company was one which might result in discrimination, and it did determine that the practice could

so result (R. 38). This was the Commission's duty, not the court's.

The case of *Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co.*, 133 Fed. Supp. 680, really confirms appellee's position. The facts distinguish the case from the one at bar, but the court did not deviate from the holdings in the decisions we have cited in connection with the exclusive primary jurisdiction rule. The court referred to the decision of the Supreme Court in *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, which held that a shipper could not maintain an action at common law for excessive and unreasonable freight rates on interstate shipments "where the rates charged are those which had been duly fixed by the carrier according to the Act and had not been found to be unreasonable by the Interstate Commerce Commission" (p. 690).

The case of *Chicago, M., St. P. & P. R. Co. vs. Alouette Peat Products* (9 Cir. 1958), 253 F. (2d) 449, is clearly distinguishable. First of all, that case arose out of a direct attack, (not collateral), upon the Order of the Commission, and while the Commission first found that the rates were unjust and unreasonable and ordered reparation and then reversed itself and found that it had not been shown that the rates were unjust or unreasonable, nevertheless, the Commission found, that the rates in question were placed in a tariff which was not a legal tariff, because the tariff attempted to make the rates effective upon five day's notice instead of thirty day's notice as the statute required. The Commission

could not violate the mandatory requirement of the law. In the last paragraph of the court's opinion it is said, "The short answer to this specification of error is that it was not the trial court who found that the railroad failed to comply with the Order in Ex Parte 162, but it was the Commission, and the Commission's finding in that respect is final and conclusive."

The court also held that shippers had always been required to pay the rates specified in the tariff and quotes in a foot note from the case of *Davis vs. Portland Seed Company,* 264 U. S. 403, 425, 68 L. Ed. 762 as follows. "The statute required rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." In the case at Bar, the provisions of the tariff were not followed and as we will show, and as appellant has already admitted on page 9 of its brief, the "carrier cannot be estopped or waive collection of applicable rates." Neither can it waive rules and regulations set forth in the tariff.

The difference between the cases cited by appellant and those which we have cited herein are that different principles are involved as illustrated by the statement contained in the case of *Great Northern Ry Co. vs. Merchants' Elevator Co.,* 259 U. S. 285, 291, 42 S. Ct. 477, 66 L. Ed. 943, referred to in the case of *Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co.,* supra, wherein the Supreme Court stated, "Whenever a *rate, rule,* or *practice* is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." (Emphasis supplied) In the case at Bar,

the appellant, before the Commission, attacked the rate and the rule under the tariff and, in effect, asked the Commission to sanction the practice which it was following in not complying with the rules of the tariff. The Commission not only held that the rates were not unreasonable and also that the claim procedure practice adopted by the appellant offered "opportunities for irregularities which are minimized by the established transit rules" (R. 38).

2.

The Appellee Carrier Could Not Waive the Provisions of the Applicable Tariff, or condone a practice not authorized by the tariff.

The carrier not only cannot waive the provisions of a tariff, neither can it allow a practice or privilege to exist which is not set forth in the tariff.

This action is based upon the provisions of *49 U. S. C. A. 6 (7)* which provides that no carrier can participate in transportation of passengers or property, unless its rates are published in a tariff; it must charge and collect no more and no less than the tariff provides,

> "nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs" 49 USCA 6 (7).

Appellant's defense in this action is based entirely upon what is stated in paragraph IV of the agreed statement of facts (R. 16), and the argument that it now makes is that the appellee is estopped to deny the practice which the appellant's representative adopted as mentioned in the agreed statement of facts, or that the appellee carrier waived the plain provisions of the transit tariff. That this cannot be done is admitted by appellant in its brief at the bottom of page 9. In other words, appellant is now contending that because of the conduct of the parties with reference to the practice which appellant's representative adopted, appellee cannot now be heard to say that such a practice was wrong.

The decision of the Interstate Commerce Commission, irrespective of whether the exclusive primary jurisdiction rule prevails, was correct as a matter of law. Judge Taylor's opinion (R. 42-48) *161 Fed. Supp. 52,* is not only a well written opinion, but is also correct, for under the authorities and, in fact, the admission made by appellant, the decision of the Commission and the court, could not have been otherwise.

The agreed statement of facts sets forth the rules and regulations of the transit tariff which is "that when shipments *are forwarded* from the transit station, unexpired inbound freight bills, which have been recorded, or tonnage credit slips *must* be surrendered and canceled; that the outbound bill of lading or shipping order *must* have inserted thereon the weight, point of origin, and date of each inbound shipment covering the commodities forwarded *and that the transit rate will not apply if shippers fail or decline to comply*

with all rules and regulations." (Emphasis supplied). (R 27, 28).

This tariff says plainly what must be done, "when shipments are forwarded from the transit station," not that the information is to be supplied sometime later with claims that are filed. It is admitted that the provisions of the tariff were not complied with at the time the shipments were forwarded from Twin Falls, and the tariff definitely states that the transit rate would not apply if the shippers fail or decline to comply with all the rules and regulations.

Consistent with the law, the Interstate Commerce Commission held, "Departures from the rules and regulations of the published tariff were not justified, even though the claim procedure may have been approved by an agent of the defendants. The tariff's provisions must be observed" (R. 34). The word "defendants" referred to by the Commission, of course, were the carriers. This statement by the Commission further emphasized that the defense of appellant has reference to the conduct of the parties. This court stated in *National Carloading Corp. vs. Atchison T. & S. F. Ry. Co.*, 150 Fed. (2d) 210:

> "It should be noted here that conduct, intention, mistake and misunderstanding are no defense to such an action."

In that case, the Interstate Commerce Commission broke up what it said was an illegal practice by the carrier, just as

the appellee in this case stopped an illegal practice which existed, and then sued to recover the proper charges.

Similarly, this court in *West Coast Products Corp. vs. Southern Pacific Co.,* 226 Fed. (2d) 830, said:

> "There is a suggestion in the record that in the past such shipments have been carried under the tariff description now claimed to be applicable by West Coast. Whether or not this is reasonably explained makes no difference. The carrier is not subject to estoppel. The law requires the railroad to charge and collect the applicable rate irrespective of erroneous interpretations in the past. Otherwise, the policy against the allowance of rebate might be violated."

We think these two cases are conclusive. This court, also, in the case of *Northern Pacific Ry. Co., vs. Mackie,* 195 F. (2d) 641, held that the provisions of the bill of lading relating to claims must be complied with, and "that the carrier cannot waive the provision." The court also said in that case:

> "A vital purpose of the Interstate Commerce Act is to prevent preferences and discriminations by carriers as among shippers. For the carrier to disregard the condition precedent to recovery incorporated in the bill of lading here would, under the circumstances shown, open the door to evasion of the spirit and purpose of the Act in the respects mentioned."

That statement, of course is consistent with the cases cited by Judge Taylor in his memorandum opinion (R. 45-46). We think the case of *Lowden vs. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 83 L. Ed. 953, 957, is particularly applicable. The Supreme Court in that case stated that, "It is equally important to aid the efforts of a carrier in collecting published charges in full."

See also, *Louisville & N. R. Co. vs. Maxwell,* 237 U. S. 94, 59 L. Ed 853.

The rules and regulations of a tariff are just as important as the rate named. The rules and regulations in a great many cases, and that is true in this case, affect the rate and determine which rate is applicable.

Probably the most recent statement by the Supreme Court is contained in *United States vs. Western P. R. Company,* 352 U. S. 59, 1 L. Ed. (2d) 126, and in Note 20 on page 139 of the Law Edition Report, to the effect that under the Interstate Commerce Commission Act, *49 U. S. C. A. 6 (7),* a shipper may not invoke the defense of estoppel and that the Act forbids "departures from the published tariff."

Appellant is endeavoring to sustain its defense on equity principles. Under the provisions of the Interstate Commerce Commission's Act "the legality of the rate claimed applicable is not dependent upon the equities involved." *Armour & Co. vs. Atkinson, Topeka & Santa Fe Ry. Co.* (7 Cir.) 254 F. (2d) 719, 723.

In addition to the question of waiver or estoppel, there is another question equally important, and that has reference to the so-called claim procedure which the appellant followed and which was adopted by its representative to avoid the plain provisions of the tariff. This claim procedure appellant adopted was a privilege which, for a time at least, the appellee carrier extended to appellant, but without such privilege or arrangement having been authorized by or set forth in the tariff.

The Commission found that this claim procedure and settlement was, "not authorized by the applicable transit tariff" (R. 28).

The last part of *49 U. S. C. A. 6 (7)* states that a carrier may not refund or remit in any manner or by any device any portion of the rates "nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs." The privilege or practice adopted by the appellant was not specified in any tariff and, accordingly, was illegal. One of the purposes of the enactment of the Interstate Commerce Commission Act was to prevent any secret or side arrangements between a shipper and a carrier, and that is the reason that all rules, regulations, privileges and rates must be set out in the tariff so that there can be no discrimination. Under the practice adopted by appellant in this case, there being nothing in the tariff concerning it, the carrier could have permitted the practice to exist as it did for awhile with appellant, and in another case refuse to permit it. As the Supreme

Court said in *Armour & Co. vs. Alton R. Co.*, 312 U. S. 195, 85 L. Ed. 771, 775:

> "The complaint shows that there is no provision in the tariff which would authorize the railroads to make refunds to petitioner of those charges paid by petitioner to the Stock Yards Company. Such refunds, if made, would be in the nature of special allowances not authorized by the tariff. A court's adjudication of this question in this case would not uniformly benefit all shippers for whom respondents have transported livestock. Whether or not such a refund would amount to a discrimination should be determined by studies such as those the Interstate Commerce Commission is especially empowered to make."

As mentioned by the Interstate Commerce Commission (R. 38), transit arrangements have been a source of discrimination and that uniform rules and regulations in tariffs are necessary to afford equal opportunities to all shippers. The Commission also stated that the rules and regulations have played an essential part "in the maintenance of equality of charges for competing transit operators," and then concludes:

> "Obviously, the desired claim procedure offers opportunities for irregularities which are minimized by the established transit rules. It would impose greater administrative obligations on the defendants in policing transit arrangements and making repayments

based on the through single-factor rates, and has no sound evidentiary support" (R. 38, 39).

In *Oregon-Washington R. & Nav. Co., vs. C. M. Kopp Co.* (Wash.) 120 Pac. (2d) 845, 138 A. L. R. 633, the court held that a carrier's promise to notify a purchaser when his order of diversion is accomplished was discriminatory and void because such a service was not contained in the published tariff. It was so held notwithstanding the carrier's custom to enter into agreement to notify shippers of the accomplishment of such orders. In that case the court refers to *49 U. S. C. A. 6 (7)*, and also cites the case of *Chicago & Alton R. R., vs. Kirby*, 225 U. S. 155, 56 L. Ed. 1033 in which it is said:

> "A shipper is presumed to know what the published rates are, and if they do not contain provisions for the special service guaranteed to him he must be taken as having contracted for a rate discriminatory in his favor."

In the Kopp case it was asserted that respondent's custom to enter into agreement with shippers to notify them of the accomplishment of diversion orders did not result in any preference to Kopp or discrimination in his favor, just the same as the defendant argues in this case. However, the Supreme Court of Washington said that such an argument was foreclosed by the opinion of the Supreme Court in *Davis vs. Cornwell*, 264 U. S. 560, 68 L. Ed. 848, in which the court quotes from the Kirby case, stating that a special contract to

transport a car by a particular train on a particular day is illegal when not provided for in the tariff;

> "The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. *It was not necessary to prove that a preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference.* * * * The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery" (Emphasis supplied).

In *Davis vs. Henderson,* 266 U. S. 92, 69 L. Ed. 182, Henderson sued the Railroad for damages because it failed to furnish a car within a reasonable time after notice. The carrier defended on the ground that the shipper had not complied with the rule contained in its tariff, which provided that orders for cars must be placed in writing. Written notice was not given. The Supreme Court reversed a judgment in favor of Henderson, saying:

> "The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff."

Also in point, we think, is the case of *Pennsylvania R.*

Co. *vs. International Coal Mining Co.*, 230 U. S. 184, 57 L. Ed. 1446.

The law is clear. The Commission and Judge Taylor were correct.

(Appellant's Point I, Pages 9-14)

In our opinion, appellant has cited no cases which support its theory. It refers to the case of *Utah Poultry Producers Corp. vs. Union Pacific R. Co.* (10 Cir. 1945), 147 F. (2d) 975, and quotes part of the decision. This decision, in our opinion, is authority for appellee. According to that opinion, it is for each railroad to determine whether transit privileges will be allowed "and the conditions under which it may be exercised," which means that the rules and regulations governing the privileges must be set out clearly in the tariff. It does not mean that the carrier can set out the conditions in the tariff and then ignore them, or that the shipper can obtain the benefit of the privilege without complying with the conditions, or by substituting a procedure contrary to the provisions of the tariff. In the Poultry Producer's case, the court said:

> "It follows that the tariff granting transit priviliges determine the nature of the rights conferred thereby, and that when the character and extent of these rights come into question we must seek the answer within the four corners of the published tariff itself."

A little later the court also said:

> "Transit privileges grant special concessions to the shipper. In permitting them, the Interstate Commerce Commission has been zealous in protecting the integrity of the through rate. It is made plain in all its decisions that unless such privileges are carefully circumscribed, they permit opening the doors to discrimination and thus tend to destroy the integrity of the through rate."

Appellant also cites the case of *Pacific Portland Cement Company vs. Western Pacific Railroad Company* (9 Cir. 1950), 184 F. (2d) 35, which involves a situation regarding demurrage charges. This case is clearly distinguishable from the facts in the case at Bar. In that case, a railroad company ordinarily held cars for prospective loading by the cement company on the railroad's own track at Gerlach, Nevada, and supplied cars to the cement company on its own private tracks whenever the cement company placed orders for the cars with the railroad. Congestion developed in the railroad yards at Gerlach, so the railroad, solely for its own benefit, asked permission of the cement company to store cars on the cement company's track to relieve the railroad congestion. Later, a railroad representative concluded that demurrage on the cars loaded by the cement company should be determined from the time the railroad placed the cars for storage on the cement company's track, rather than from the time orders were placed for cars and they were appropriated by the cement company. If the cars had remained on the rail-

road's track in storage, demurrage would have been determined from the time the car order was placed and the car appropriated for loading by the cement company. The court refused to permit the carrier to recover the demurrage charges on the basis mentioned, and it was right in so doing, for under the tariff, "the time on which demurrage charges are based did not commence to run until appellant spotted the cars for loading."

The court did not stray in the least from the principles of law governing tariffs and matters under the Interstate Commerce Commission's Act, for it said:

> "We agree that published tariffs are binding on both carrier and shipper *and that the shipper's liability under such tariffs cannot be waived by any arrangement, understanding or course of conduct between the parties.* (Citing 49 U. S. C. A. 6 (7) and other cases.) (Emphasis supplied).

To make the decision of the court clearer, it further stated:

> "It is no less true, however, that the tariffs themselves impose no liability for demurrage under the facts of the instant case."

The court said that a contrary holding would result in the shipper being held liable to the railroad for a service which the shipper had rendered to the railroad, but as a matter of

fact, there was no violation of the tariff.

The statement quoted by appellant on page 13 of its brief, we think, was wholly unnecessary to a decision of the case, because having previously held that the tariff imposed no liability for demurrage, that ended the matter.

The case of *Southern Ry. Co., vs. Aluminum Co. of America,* 119 F. Supp. 389, affirmed (6 Cir.) 210 Fed (2d) 139, cited by appellant is similar to the *Pacific Portland Cement Company* case. The tariff had not been violated and, hence, no demurrage was due the carrier.

Contrary to appellant's contention, the carrier, as we have shown, could not legally interpret the tariff contrary to its plain provisions and purposes, and neither could it waive such provisions, or, by its conduct, condone a practice (the claim procedure) which was not set forth in the tariff.

(Appellant's Point II, pages 15-23.)

In the case of *Glickfield vs. Howard Van Lines* (9 Cir. 1954), 213 F. (2d) 723, the tariff stated that the reduced rates were "conditioned upon the use of the uniform household goods bill of lading," nevertheless, the carrier issued its "*combined* uniform household goods bill of lading *and freight bill*" which, as the court mentioned, was "subject to the classification and tariffs, rules and regulations in effect on the date of the issue of this bill of lading." This bill of lading, therefore, contained what the tariff mentioned and a little more—not less. We have emphasized the parts added

apparently by the carrier which did not detract from the requirements of the tariff. What really distinguishes the Glickfield case from the one at Bar is this statement by the court, "In fact, insofar as the instant shipment was concerned, the issued bill of lading spoke the truth and covered every relevant requirement of the Interstate Commerce Act and the Commission's regulations." That statement cannot be made in the case at Bar. None of the tariff requirements were complied with, and there was no tariff authority for the claim procedure which was adopted. In the Glickfield case there could be no chance for a conspiracy or intention to avoid the applicable law, for it was complied with. All shippers were openly treated the same.

In the case at Bar, unless the evidence was supplied at the time the bill of lading was issued and when the shipments were tendered to the carrier at Twin Falls, there was no way in which the carrier could determine whether the shipments were entitled to the transit rate. After the shipments had moved from Twin Falls, this could not be determined.

In the Glickfield case, the court further said, "The shipper was charged a rate which had been duly filed and approved by the Commission, and was based upon a written declaration of released valuation as to the property," which established what the court had previously said, that "every relevant requirement of the Interstate Commerce Act and the Commission's regulations had been fully complied with." That case involved neither rates, reparations, rebates or discriminations. Appellant, by its own plan to evade the tariff,

and without complying with the tariff, obtained an advantage no other shipper had or might obtain, for appellant's plan was not contained in the tariff as the Act, *49 U. S. C. A. 6 (7)* requires.

The case of *Loveless vs. Universal Carloading & Distributing Company* (10 Cir. 1955), 225 F. (2d) 637, cited by appellant has no application to the case at Bar. The court does refer to *Northern Pac. Ry. Co. vs. Mackie,* (9 Cir.) 195 Fed. (2d) 641, to which we have previously referred, and which holds that the bill of lading provisions with reference to presentation of claims must be complied with by the claimant, and "that the carrier cannot waive the provisions." In the Loveless case there was clear liability and an express admission thereof, together with a written memorandum from the carrier's agent which in part stated that the memorandum "will protect you in the event claim will be filed, for a period of up to two years." The carrier's agent stated that he had notified the carriers that a claim would be filed. The court held that to satisfy the provision of the bill of lading the writing need not be in any particular form and that what was done was sufficient to apprise the carrier that damages had occured for which an award of damages could be expected; that the purpose of the filing of the claims under the provisions of the bill of lading was to enable the carrier to make an investigation, and that that had been accomplished. The Loveless case clearly has no application to the case at Bar. There was no intentional or other disobedience of the tariff, neither was there a plan of procedure to obtain

privileges which were not published in a tariff, such as in the case at Bar.

The Loveless case is based almost entirely upon the Hopper case, and the Hopper case has been questioned many times, whereas the Mackie decision of this court has not. *East Texas Motor Freight Lines vs. United States* (5 Cir.) 239 F. (2d) 417, 420.

Appellant makes an effort to distinguish the case of *Chicago & N. W. R. Co. vs. Connor Lumber & Land Co.* (7 Cir.) 212 Fed. (2d) 712, but we think that cannot be done, for the law as announced in that decision is, "* * * a transit privilege is not a matter of right; and all conditions and limitations prescribed with reference to it must be observed", and as further quoted by Judge Taylor in his opinion where the situation was quite similar to the case at Bar because the defendant in that case had originally desired to, and did, avail itself of the transit rate's plan set up in the tariff, "it thereby became obligated in order to obtain the concession of such lower through rates to comply with every pertinent provisions of the tariff imposing duties upon it as a shipper."

Another case which has not been referred to and which cannot be distinguished from the case at Bar is *Tex-O-Kan Flour Mills Co., vs. Texas & P. Ry. Co.* (5 Cir.) 178 Fed. (2d) 89.

CONCLUSION

We think that a comparison of what the tariff requires

(R. 15, 27-28) with the information appellant says was supplied with each claim (R. 16) establishes that there was not even a compliance with the tariff when the claims were filed after the shipments were made, but in any event, the Interstate Commerce Commission had exclusive jurisdiction of the issues it was called upon to decide and its Findings and Order are conclusive. Judge Taylor found it unnecessary to decide that issue because he agreed that the holding of the Commission was correct. We think the Commission and the trial judge could have decided no other way and stayed within the law. That the judgment of the trial court must be affirmed is

Respectfully submitted,

BRYAN P. LEVERICH
L. H. ANDERSON
E. C. PHOENIX
D. A. BYBEE
Attorneys for Appellee.